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No. 79-1961

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States may be held liable under the Suits in Admiralty Act for the Coast Guard's discretionary decision not to establish a particular aid to maritime navigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-30a) is reported at 614 F. 2d 556. The opinion of the district court (Pet. App. 1a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1980. A petition for rehearing was denied on March 20, 1980 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on June 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

46 U.S.C. 742 provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *.

STATEMENT

Petitioner Marshall Bearce is the representative of the estate of Thomas Bearce, who was killed when the pleasure boat he was operating collided with a breakwater in the Chicago Harbor on May 10, 1975.[1] In this action against the United States, brought under the Suits in

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[1]Petitioner Leslie Palmer was the owner of the boat that the decedent was operating at the time of the collision; the boat was insured by petitioner Aetna Insurance Company (Pet. App. 10a).

Admiralty Act, ch. 95, 41 Stat. 525, 46 U.S.C. 741 *et seq.*,[2] petitioners alleged that the Coast Guard negligently caused Bearce's death by failing to erect an additional aid to navigation at the site of the accident.

The accident occurred as Bearce attempted to pass through the Oak Street Gap, an opening between two of the breakwaters that form part of the Chicago Harbor. Pursuant to its authority under 14 U.S.C. 81, the Coast Guard had marked the eastern side of the gap with a flashing green light, and the area was properly charted. The edge of the breakwater on the western side of the gap, with which Bearce collided, was not lighted. Petitioners contended that the Coast Guard had a duty to erect additional aids to navigation in the area and that its failure to establish a light on the western side of the gap had caused Bearce's death.

After a trial in the United States District Court for the Northern District of Illinois, the court granted judgment for the United States (Pet. App. 1a-20a). The district court held that the government owed no duty to the public to construct an aid to navigation at any particular place. The court found that Bearce was familiar with the area and that a prudent mariner could have navigated the gap safely by using the existing light. Accordingly, the court concluded that the accident was caused solely by the negligent operation of the boat at high speed (*id.* at 16a-17a).

The court of appeals affirmed (Pet. App. 21a-30a). The court noted that the presence of another light might have prevented Bearce's accident (*id.* at 22a n.1), but concluded

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[2]Petitioners originally brought this action under 28 U.S.C. 2675 (the Federal Tort Claims Act), but amended the complaint to assert a maritime wrongful death claim under the Suits in Admiralty Act.

that in enacting the Suits in Admiralty Act Congress did not waive sovereign immunity with respect to claims such as that asserted by petitioners (*id.* at 24a-26a). The court reasoned that decisions on whether and where to construct aids to navigation involve discretionary policy judgments concerning the distribution of scarce public resources and that Congress did not intend the exercise of such judgments to give rise to tort liability under the Act (*id.* at 27a-29a).

ARGUMENT

1. Petitioners' principal contention (Pet. 8-10) is that Congress' failure to include in the Suits in Admiralty Act an explicit statement eliminating liability for governmental policy decisions must be interpreted to mean that it intended to create such liability. However, the court of appeals correctly followed the reasoning of *Gercey* v. *United States,* 540 F. 2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977), in concluding that the Suits in Admiralty Act must be construed to include an exception for discretionary governmental functions.

Suits brought under the Federal Tort Claims Act are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). For the reasons set forth in our brief in opposition to the petition for certiorari in *Gercey* v. *United States,* No. 76-807, October Term, 1976 (at 5-6),[3] there is no basis for concluding that Congress intended to remove the discretionary function exception (and, *sub silentio,* to subject the government to new tort

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[3]We are sending a copy of our brief in opposition in *Gercey* to counsel for petitioners.

liability) when it transferred certain maritime tort actions from the Federal Tort Claims Act to the Suits in Admiralty Act in 1960. Indeed, the legislative history demonstrates that the amendment was intended only to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims. See also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175-176 (1976).[4]

Nothing has occurred since the denial of certiorari in *Gercey* to make this question worthy of review. Petitioners, as did the petitioner in *Gercey*, argue (Pet. 7-8) that review by this Court is necessary to resolve an alleged conflict among the courts of appeals, but as we explained in *Gercey* (Br. in Opp. at 7 & n.3), it is not at all clear that there is any actual conflict in result.

In the present case, the Coast Guard's decision to leave the west side of the Oak Street Gap unlighted was undoubtedly "a basic policy judgment as to how the public interest may best be promoted" (Pet. App. 29a n.9, quoting *Gercey* v. *United States, supra*, 540 F. 2d at 538). The decision whether to make additional improvements at a secondary entrance to a harbor requires a judgment as to whether the possible danger in the area is so great as to warrant the diversion of limited funds from other areas (see Pet. App. 29a).[5]

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[4]Prior to the passage of the Suits in Admiralty Act, the "discretionary function" exception had regularly been applied in Federal Tort Claims Act cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Kline* v. *United States*, 113 F. Supp. 298 (S.D. Tex. 1953); *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957).

[5]The court of appeals noted (Pet. App. 29a) that the Coast Guard has recommended that large numbers of new aids to navigation be established. Congress, however, has not provided funding to implement many of those requests. As the court of appeals concluded

2. Liability in tort can be found only if the alleged tortfeasor breached a duty of care to the injured party and if the breach of duty proximately caused the injury. But as this Court has noted, Congress has not imposed on the Coast Guard a mandatory duty to establish aids to navigation. *Indian Towing Co.* v. *United States,* 350 U.S. 61, 69 (1955). See *Chute* v. *United States,* 610 F. 2d 7, 11 (1st Cir. 1979), cert. denied, No. 79-1311 (May 5, 1980). Of course, the government may be held liable for negligence if it induces reliance on a warning device and then fails to maintain it properly. *Indian Towing Co.* v. *United States, supra,* 350 U.S. at 65. But here, petitioners' only complaint is that the Coast Guard failed to *undertake* a service; under *Indian Towing* it is clear that such a complaint does not state a claim upon which relief can be granted. The mere fact that the Coast Guard had legal authority to erect navigational aids did not result in a duty to petitioners upon which a claim for damages may be founded.

3. Finally, there is no merit to petitioners' suggestion (Pet. 13-14) that the decision here conflicts with principles established in *Moragne* v. *States Marine Line,* 398 U.S. 375 (1970) and *Sea-Land Services* v. *Gaudet,* 414 U.S. 573 (1974). Those cases addressed the question whether an action for wrongful death based on unseaworthiness could be maintained under federal maritime law. The Court concluded that federal maritime law could supply a remedy for wrongful death in that situation, even though it was not specifically provided for by statute. We fail to see how *Moragne* and *Gaudet* bear on the issue at bar, especially since those cases involved only the liability of

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(*ibid.*; footnote omitted), "[t]he allocation of funds for the construction of new aids to navigation requires policy judgments concerning the public interest, and thus is a discretionary function which courts should not review in the context of a tort claim."

private parties and did not raise any issue of sovereign immunity or arise under either the Federal Tort Claims Act or the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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